

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0646

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID RICHARD MAPLES,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Eighteenth Judicial District Court,  
Gallatin County, The Honorable Holly Brown, Presiding

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## **STATEMENT OF THE ISSUE**

Whether the district court erred in denying Appellant's motion to dismiss the Information on the ground the statute requiring violent offenders to register is unconstitutionally vague as applied to Appellant?

## **STATEMENT OF THE CASE**

David Richard Maples, the Appellant, was charged by Information on July 22, 2008, in the Eighteenth Judicial District Court, Gallatin County, with failing to register as a violent offender, a felony, in violation of Mont. Code Ann. §§ 46-23-504 and 507 (2007), the version in effect at the time alleged in the Information. (D.C. Doc. 4.) Maples moved to dismiss the Information. (D.C. Doc. 44.) Maples asserted that Title 46, Chapter 23, Part 5 of the Montana Code Annotated, the Sexual or Violent Offender Registration Act (SVORA), was unconstitutionally vague as applied to Maples. Maples' "void for vagueness" argument revolved around the enactment of, and various amendments to, the SVORA and challenged whether the statutes sufficiently gave him actual notice they applied retroactively to his offenses, thus requiring him to register as a violent offender. (D.C. Doc. 44.)

Without an evidentiary hearing on Maples' motion to dismiss, the district court denied the motion. (D.C. Doc. 54.) Maples ultimately pled guilty, reserving his right to appeal. (D.C. Doc. 62.) The district court sentenced Maples to the Department of Corrections for three years, all suspended, and ordered Maples to

register as a violent offender pursuant to Mont. Code Ann. § 46-23-504. (D.C. Doc. 65.) It is from this final judgment, specifically the district court's denial of the motion to dismiss, that Maples now appeals. (D.C. Docs. 54, 65 attached as Ex. 1 and 2.)

### **STATEMENT OF THE FACTS**

The following facts are largely taken from the State's Affidavit of Probable Cause in support of the Information. The State alleged that in January 2008, an agent with the Gambling Investigation Department Bureau was assigned to review an application for a dealer's license for Maples. (D.C. Doc. 1.) During his investigation, the agent discovered Maples had felony convictions in Florida which could potentially require Maples to register as a violent offender in Montana and that Maples was not registered as a violent offender in Montana. (D.C. Doc. 1.)

Observing Maples resided in Gallatin County, the agent notified Bozeman Police Department Detective Charley Gappmeyer of his discoveries regarding Maples. (D.C. Doc. 1.) Detective Gappmeyer allegedly contacted Maples by telephone on March 10, 2008, and advised Maples he needed to register with the State as a violent offender. (D.C. Doc. 1.) The following day, Detective Gappmeyer requested a copy of Maples' sentencing order and case file in the Florida case, which confirmed Maples had been convicted of the felony offenses of murder in the second degree and conspiracy to commit murder, for which he

received concurrent sentences of 15 years. (D.C. Doc. 1.) The district court found Maples was incarcerated on December 7, 1993, and discharged his Florida sentence on September 29, 1999. (D.C. Doc. 54.) Detective Gappmeyer verified that, as of June 11, 2008, Maples had not registered as a violent offender in the State of Montana.

### **STANDARD OF REVIEW**

“A District Court’s grant or denial of a motion to dismiss in a criminal case is a question of law which we review *de novo*.” *State v. Renvold*, 2006 MT 146, ¶ 14, 332 Mont. 392, 139 P.3d 154 (citation omitted).

### **SUMMARY OF ARGUMENT**

Title 46, Chapter 23, Part 5 of the Montana Code Annotated, the SVORA, is unconstitutionally vague as applied to Maples, and, as a result, the charge against him alleging a violation of statutes contained in the SVORA should have been dismissed. Specifically, the SVORA did not provide Maples actual notice of its retroactive application to his offenses such that he reasonably could have understood he was required to register as a violent offender.

## ARGUMENT

### **MONTANA CODE ANNOTATED TITLE 46, CHAPTER 23, PART 5 IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO MAPLES, THEREFORE THE CHARGE SHOULD HAVE BEEN DISMISSED.**

A criminal statute is unconstitutionally vague if “a person is required to speculate as to whether his contemplated course of action may be subject to criminal penalties.” *City of Billings v. Albert*, 2009 MT 63, ¶ 16, 349 Mont. 400, 203 P.3d 828 (quoting *State v. Mainwaring*, 2007 MT 14, ¶ 18, 335 Mont. 322, 151 P.3d 53). Both the United States Constitution and the Montana Constitution protect against vague statutes that infringe a citizen’s right to due process. U.S. Const. amend. XIV, § 1; Mont. Const. art. II, § 17. The void for vagueness doctrine “requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *State v. Knudson*, 2007 MT 324, ¶ 18, 340 Mont. 167, 174 P.3d 469 (quoting *Kolender v. Lawson*, 461 U.S. 352 (1983)).

Relying on the United States Supreme Court’s reasoning in *Kolender*, this Court developed a two-part test to determine whether a statute is unconstitutional as applied to a particular situation. *State v. Dixon*, 2000 MT 82, ¶ 27, 299 Mont. 165, 998 P.2d 544. First, this Court considers whether actual notice was given to



citizens. *Dixon*, ¶ 27. Second, it must determine whether the statute contains minimal guidelines sufficient to govern law enforcement. *Dixon*, ¶ 27.

In the context of an as-applied challenge, this Court must determine whether a statute provides constitutionally adequate notice by examining the statute “in light of the conduct with which the defendant is charged in order to determine whether the defendant could have reasonably understood that his conduct was proscribed.” *Dixon*, ¶ 28. In the instant case, then, the question is whether Maples could have reasonably understood that his conduct was proscribed.

There is a presumption in Montana law against applying statutes retroactively. *State v. Hamilton*, 2007 MT 167, ¶ 10, 338 Mont. 142, 164 P.3d 884. Montana Code Annotated § 1-2-109, provides that statutes are not retroactive unless expressly declared retroactive by the Legislature. Legislative intent that statutes be applied retroactively must be manifest in the statutes and from no other source. *Hamilton*, ¶ 10.

Maples concedes he was convicted in Florida of the felony offenses of murder in the second degree and conspiracy to commit murder in the second degree on November 24, 1993, and that he was incarcerated for these convictions in December 24, 1993. Maples discharged his sentences on September 29, 1999. In its current version, Mont. Code Ann. § 46-23-504, requires sexual and violent offenders to register with local law enforcement officials and give them

information regarding where the offender resides. Maples does not dispute that his Florida convictions meet the definition of “violent offense” set forth in § 46-23-502(13).

As originally enacted in 1989, Title 46, Chapter 23, Part 5 of the Montana Code Annotated created registration requirements only for sexual offenders and became effective on July 1, 1989. *See* 1989 Mont. Laws, ch. 293, § 5. In 1995, the Montana Legislature amended the statutes to require registration by violent offenders as well, to be effective October 1, 1995. *See* 1995 Mont. Laws, ch. 407, § 7. The 1995 legislative amendment did not contain any express statement as to its retroactive applicability.

In addressing a challenge to the retroactive application of the new requirements for violent offenders, this Court held that, upon review of the legislative history of the 1995 amendments, the Legislature did not intend to apply the new violent offender registration requirements to individuals convicted of violent offenses prior to October 1, 1995. *State v. Whitmer*, 285 Mont. 100, 103, 946 P.2d 137, 139 (1997). Therefore, the new violent offender registration statutes would not have applied to Maples because he was convicted prior to October 1, 1995.

As noted in *Whitmer*, the Montana Legislature again amended the SVORA in 1997. *Whitmer*, 285 Mont. at 103, 946 P.2d at 139. The 1997 legislation

expressly stated the provisions of the SVORA relating to the registration applied to “violent offenders who are sentenced or who are in custody or under the supervision of the department of corrections on or after October 1, 1995.” *See* 1997 Mont. Laws, ch. 375, § 18. The State did not dispute Maples’ assertion this legislation did not operate to bring Maples within the purview of the SVORA—Maples was sentenced prior to October 1, 1995, and he has never been in the custody or under the supervision of the Montana Department of Corrections.

The Montana Legislature amended 1997 Mont. Laws, ch. 375, § 18 in 2001 to broaden the enactment’s retroactivity provision. *See* 2001 Mont. Laws, ch. 152, § 1. The Legislature again amended the SVORA in 2005. *See* 2005 Mont. Laws, ch. 313 . The Legislature failed to include an express statement of retroactivity with regard to the 2005 amendments.

In *Hamilton*, this Court was presented with the question of whether the Legislature intended the 2005 amendments to the SVORA to have retroactive effect notwithstanding the lack of an express retroactivity provision. This Court first observed the Montana Legislature explicitly stated in 2001 that the provisions of the SVORA applied retroactively. *Hamilton*, ¶ 12. As evidenced by the 2001 amendments to the SVORA, this Court concluded the Legislature intended the SVORA as a whole to be retroactive. *Hamilton*, ¶ 15. This Court ultimately determined that, because the legislative history for the 2005 amendments indicated

the purpose of the amendments was to make the SVORA easier to administer, including a determination as to when an out-of-state offender is required to register, it was clear the Legislature also intended the 2005 amendments to apply retroactively in the same manner as indicated in its 2001 amendment. *Hamilton*, ¶ 15.

The SVORA statutes are vague as applied to Maples because the 2001 legislative amendment regarding the retroactive applicability of the SVORA is not expressly reflected anywhere within Title 46, Chapter 23, Part 5 of the Montana Code Annotated. In the absence of such an express statement of the 2001 amendment, the registration statutes are insufficient to put Maples on notice that they apply retroactively to his offense. The text of the various statutes contained in the 2007 version of the SVORA make no mention of retroactive applicability and the legislative history pertaining to each of the individual statutes within the SVORA do not reference the Legislature's 2001 amendment regarding retroactive applicability. Therefore, the SVORA is impermissibly vague as applied to Maples.

As noted by this Court in *Hamilton*, the Legislature intended the SVORA as a whole to be retroactive as evidenced by the 2001 legislative amendments. *Hamilton*, ¶ 15. As such, it could be argued any amendment to the registration statutes after 2001 do not require an explicit statement of retroactivity to apply. If so, the 2007 Legislature's inclusion of a statement of retroactivity leads to more

confusion because this language is nothing like the broad language of the 2001 amendment. Interpretation of this clause would lead Maples to believe he was not required to register.

Because the 2001 amendment is not reflected anywhere in the code, it is unclear how one could be on notice of this broadened application of the registration statute. If the Legislature must include an explicit statement of retroactivity with every new amendment, and the Legislature changes the language of those statements from session to session, one would have to research every amendment since the code was enacted since 1995 to determine which amendments apply to which citizen. As such, an ordinary person would not understand what conduct is prohibited.

### **CONCLUSION**

Appellant's conviction for failure to register as a violent offender should be reversed and dismissed.

Respectfully submitted this 21<sup>st</sup> day of April, 2010.

JOSEPH P. HOWARD, P.C.

By: Joseph P. Howard  
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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Brief  
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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

  
JOSEPH P. HOWARD

## **APPENDIX**

Order Denying Defendant's Motion to Dismiss .....Ex. 1

Sentencing Order.....Ex. 2

Oral Pronouncement of Sentence.....Ex. 3